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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

OREGON PHYSICIANS' SERVICE, an Oregon nonprofit corporation; and PHYSICIANS' ASSOCIATION OF CLACKAMAS COUNTY, an Oregon nonprofit corporation,
Petitioners,

v.

JOHN HAHN, WADE LIGGETT, JOSEPH AIZAWA, V. G. LIVINGSTON and D. HUGH FRASER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The opinion by the Ninth Circuit panel in this antitrust litigation raises issues central to the law of health insurance antitrust coverage, and it directly conflicts with the results reached and the legal standards applied by other circuits.

The Ninth Circuit panel, in a ruling that is likely to affect a wide range of health care providers and insurers, held that the various defendants and their various policies were not within the "business of insurance" exemption from antitrust liability under the McCarran-Ferguson Act, and that the jurisdictional test under the Sherman Act is whether defendants' general business activities have a not insubstantial effect on interstate commerce. The Tenth and First Circuits have rejected the Ninth Circuit jurisdictional standard.* Another Ninth Circuit panel recently has affirmed the same district judge's decision finding a McCarran-Ferguson Act exemption in a parallel case, *Klamath Lake Pharm. Ass'n* v. *Klamath Med.*, 701 F.2d 1276 (No. 81-3608, 9th Cir. 1983). Other courts have found similar insurance activties to be exempt.

These divergent results stem from the courts' conflicting resolution of two fundamental legal questions:

1. May a District Court require antitrust plaintiffs to point to the relevant channels of

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* *Crane* v. *Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981) (en banc); *Cordova & Simonpietri Ins.* v. *Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981).

interstate commerce logically affected by the defendants' allegedly unlawful conduct in order to establish jurisdiction?

2. May a District Court apply the McCarran-Ferguson Act exemption for the "business of insurance" to health care insurers organized and regulated under state and federal law as health care contractors, health maintenance organizations and individual practice associations?

PARTIES TO THE PROCEEDINGS

Petitioners were among the appellees and defendants below. The Oregon health insurer appellee-defendants were:

Oregon Physicians' Service ("O.P.S.");*
Physicians' Association of Clackamas County ("P.A.C.C.");
Portland Metro Health Physicians, Inc. ("P.M.H.P.");
Portland Metro Health, Inc. ("P.M.H.");
Rogue Valley Physicians' Service ("R.V.P.S.");
Klamath Medical Service Bureau ("K.M.S.B.");
and
Greater Oregon Health Services, Inc. ("G.O.H.S.").

Josephine M. Driscoll, Acting Insurance Commissioner of the State of Oregon, became the Receiver for and was substituted on appeal for P.M.H.

Respondents were among the appellants and plaintiffs below. The appellant-plaintiffs were: John Hahn, Wade Liggett, Joseph Aizawa, Hide Aizawa, V. G. Livingston, D. Hugh Fraser, Lawrence Helton, David Hoyal, Elmer Dorr, and Jeffrey L. Widen.

Petitioners believe the following parties have no interest in the outcome of this petition: appellee-defendants P.M.H.P., P.M.H., R.V.P.S., K.M.S.B. and G.O.H.S.; appellant-plaintiffs Hide Aizawa, Helton, Hoyal, Dorr and Widen.

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*On March 1, 1983, petitioner O.P.S. merged with Blue Cross of Oregon. The resulting organization is known as Blue Cross and Blue Shield of Oregon.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The District Court Properly Applied the Jurisdictional Test by Weighing the Effect That the Allegedly Objectionable Restrictions Have on Interstate Commerce	9
II. The District Court Properly Found an Exemption Under the McCarran-Ferguson Act for the "Business of Insurance" Involved Here	15
CONCLUSION	20

APPENDIX

App. A: Ninth Circuit opinion, October 5, 1982.	1
App. B: District Court opinion, February 27, 1981.	14
App. C: Ninth Circuit judgment, October 5, 1982.	33

TABLE OF CONTENTS (Cont.)

Page

App. D: Ninth Circuit order denying the petition for rehearing and rejecting the suggestion for rehearing en banc, January 28, 1983. 35

App. E: District Court opinion in *Klamath Lake Pharmaceutical Association* v. *Klamath Medical Service Bureau*, February 27, 1981. 37

App. F: Ninth Circuit opinion in *Klamath Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, March 4, 1983. 47

App. G: The Sherman Act, 15 U.S.C. §§ 1, 2 and 4. 87

App. H: The Clayton Act, 15 U.S.C. §§ 12, 14, 15, 22 and 26. 89

App. I: The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 and 1013. 96

App. J: The Oregon Podiatrists Statutes, O.R.S. 682.010. 98

App. K: The Oregon Insurance Code Insurance Policies Statutes, O.R.S. 743.006 and .009 99

App. L: The Oregon Insurance Code Trade Practices Statutes, O.R.S. 746.160. 102

App. M: The Oregon Insurance Code Health Care Service Contractors Statutes, O.R.S. 750.005-.075. 103

TABLE OF AUTHORITIES

Page

CASES

Anglin v. Blue Shield of Virginia, 693 F. 2d 315 (4th Cir. 1982) 19
Burke v. Ford, 389 U.S. 320 (1967) 14
Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr., 536 F. Supp. 1065 (E.D. Pa. 1982) 10, 12, 13, 14, 15
Community Builders v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) 11
Cordova & Simonpietri Ins. v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981) ..... i, 9, 11, 13
Crane v. Intermountain Health Care, Inc., 637 F. 2d 715 (10th Cir. 1981) (en banc) ..... i, 9, 11, 12, 13, 14
Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982) 19
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 14
Grant v. Erie Ins. Exchange, 542 F. Supp. 457 (M.D. Pa. 1982) 19
Group Life & Health Insurance Co. v. Royal Drug, 440 U.S. 205 (1979) 3, 6, 7, 16, 18, 19
Hahn v. Oregon Physicians' Serv., 508 F. Supp. 970 (D. Or. 1981) 1, 3, 4, 5, 6, 7, 18
Hahn v. Oregon Physicians Service, 689 F.2d 840 (9th Cir. 1982) 1, 6, 8, 10, 15, 16, 18, 19
Health Care Equalization v. Iowa Medical Soc., 501 F. Supp. 970 (S.D. Iowa 1980) 19
Heille v. City of St. Paul, Minn., 512 F. Supp. 810 (D. Minn. 1981), aff'd, 671 F. 2d 1134 (8th Cir. 1982) 12
Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976) 4, 5, 13, 14

TABLE OF AUTHORITIES (Cont.)

Page

James R. Snyder Co. v. Associated Gen. Contr., 677 F.2d 1111 (6th Cir. 1982) 10
Klamath Lake Pharm. Ass'n v. Klamath Med., 507 F. Supp. 980 (D. Or. 1981) 2, 6, 7, 18
Klamath Lake Pharm. Ass'n v. Klamath Med., 701 F.2d 1276 (No. 81-3608, 9th Cir. 1983) ..... i, 2, 7, 18
Malini v. Singleton & Associates, 516 F. Supp. 440 (S.D. Tex. 1981) 10
McDonald v. Saint Joseph's Hospital of Atlanta, 524 F. Supp. 122 (N.D. Ga. 1981) 10
McElhinney v. Medical Protective Co., 549 F. Supp. 121 (E.D. Ky. 1982) 10
McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) 3, 5, 10, 11, 12, 13, 14
Mishler v. St. Anthony's Hosp. Systems, 694 F. 2d 1225 (10th Cir. 1981) 12
Nara v. American Dental Association, 526 F. Supp. 452 (W.D. Mich. 1981) 10, 14, 15, 19
Owens v. Aetna Life & Cas. Co., 654 F.2d 218 (3rd Cir.), cert. denied, 454 U.S. 1092 (1981) .. 19
Palmer v. Roosevelt Lake Log Owners Association, 651 F.2d 1289 (9th Cir. 1981) 10, 11
Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982) 10, 12, 13
Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308 (D.C. Cir. 1982) 19
Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195 (7th Cir. 1981) 19
St. Paul Fire and Marine Insurance Co. v. Barry, 438 U.S. 531 (1978) 4, 6
Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981) 9

TABLE OF AUTHORITIES (Cont.)

Page

Thompson v. New York Life Ins. Co., 644 F.2d 439 (5th Cir. 1981) 19

Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir.), cert. denied, — U.S. —, 102 S. Ct. 2308 (1982) 11

Union Labor Life Insur. Co. v. Pireno, — U.S. —, 102 S. St. 3002 (1982) 16, 18, 19

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 9

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) 4, 16, 17, 18

Western Waste Service v. Universal Waste Control, 616 F.2d 1094 (9th Cir.), cert. denied, 449 U.S. 869 (1980) 10, 11, 12, 13, 14

STATUTES AND RULES

15 U.S.C. §§ 1, et seq. (§§ 1, 2 and 4) 2, 3

15 U.S.C. §§ 12, et seq. (§§ 12, 14, 15, 22 and 26) 2, 3

15 U.S.C. §§ 1011, et seq. (§§ 1011, 1012 and 1013) 2, 3

42 U.S.C. § 300e-1 ..... 2, 3

O.R.S. 682.010(3) 2, 4

O.R.S. 743.006 and .009 ..... 2, 5, 7

O.R.S. 746.160(3) 2, 5, 7

O.R.S. 750.005-.340 ..... 3, 5, 7

Va. Code § 38.1-824 4

Supreme Court Rule 17.1(a) 8

Supreme Court Rule 17.1(c) 8

TABLE OF AUTHORITIES (Cont.)

Page

OTHER AUTHORITIES

P. Areeda, Antitrust Law (Supp. 1982) 13, 14

Kissam, Webber, Bigus and Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Calif. L. Rev. 595 (1982) 14

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OREGON PHYSICIANS' SERVICE, et al,

Petitioners,

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JOHN HAHN, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Oregon Physicians' Service ("O.P.S.") and Physicians' Association of Clackamas County ("P.A.C.C."), respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on October 5, 1982.

OPINIONS BELOW

The opinion of the District Court is reported at 508 F. Supp. 970 and appears as App. B in the Appendix. The opinion of the Court of Appeals is reported at 689 F.2d 840 and appears as App. A in

the Appendix. Because of their significance to this petition, the parallel decisions of the District Court and the Court of Appeals in *Klamath Lake Pharm. Ass'n* v. *Klamath Med.*, 507 F. Supp. 980 (D. Or. 1981), aff'd, 701 F.2d 1276 (No. 81-3608, 9th Cir. 1983) ("*Klamath Lake*"), are included as App. E and F respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1982 (App. C). A timely petition for rehearing and suggestion for rehearing en banc was denied and rejected on January 28, 1982 (App. D). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. §§ 1, 2 and 4 (App. G).

The Clayton Act, 15 U.S.C. §§ 12, 14, 15, 22 and 26 (App. H).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 and 1013 (App. I).

The Oregon Podiatrists Statutes, O.R.S. 682.010 (App. J).

The Oregon Insurance Code Insurance Policies Statutes, O.R.S. 743.006-.009 (App. K).

The Oregon Insurance Code Trade Practices Statutes, O.R.S. 746.160 (App. L).

The Oregon Insurance Code Health Care Service Contractors Statutes, O.R.S. 750.005-.075 (App. M).

STATEMENT OF THE CASE

The District Court Opinion.

Respondent-appellant-plaintiff-podiatrists filed four separate actions in September, 1978, alleging that the petitioner-appellee-defendant-health insurers conspired or combined to boycott podiatrists in favor of other physicians in violation of the Clayton Act, 15 U.S.C. § 12 et seq, and the Sherman Act, 15 U.S.C. § 1 et seq. After initial discovery the defendants moved for summary judgment, and the District Court granted the motion on February 27, 1981.

The District Court noted that O.P.S., P.A.C.C., R.V.P.S., K.M.S.B. and G.O.H.S. are all regulated health care contractors under ORS 750.005 et seq; and that P.M.H. and P.M.H.P. are federally regulated individual practice associations under 42 U.S.C. § 300e-1. 508 F. Supp. at 972 n.1. The record also shows P.A.C.C. to be a transitional health maintenance organization.

To determine whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, et seq., applied, the District Court analyzed this Court's opinions in *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980) ("*McLain*"); *Group Life & Health Insurance Co.* v. *Royal Drug*, 440 U.S. 205 (1979) ("*Royal Drug*"); *St. Paul Fire and Marine Insurance Co.* v.

Barry, 438 U.S. 531 (1978) (*"Barry"*); and *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U.S. 738 (1976) (*"Hospital Building Co."*). The District Court also considered the Fourth Circuit's opinion in *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (*"Virginia Academy"*).

First, the District Court found that there are services involving the foot which Oregon podiatrists may not perform, and held that there was a rational basis for the policy limitations on the coverage of podiatric care. The District Court distinguished *Royal Drug* on the grounds that the agreement challenged here is the insurance contract between the insurer and the insured, and here, the alleged restraints are an integral part of the risk of covering care to the foot. The District Court held that the defendants' conclusion that their risk would be greater if podiatrists were permitted to treat their insureds equally with doctors of medicine is supported by the licensing provisions under the Oregon Podiatrists Statute, O.R.S. 682.010(3). The District Court also distinguished *Virginia Academy*, noting that the holding in that case must be considered in connection with Virginia's "Freedom of Choice" statute (Va. Code § 38.1-824), which unlike the Oregon statutes here, prohibited health insurers from differentiating for services rendered by different providers. 508 F. Supp. at 974-975.

Second, the District Court found that the business of insurance is regulated by state law, citing the Oregon Insurance Code, O.R.S. 750.005-.340 [sic], 743.006, 743.009, and 746.160(3). 508 F. Supp. at 975.

Third, the District Court found that no boycott was involved here, noting that defendants do not control the health insurance market. The District Court also found that plaintiffs had failed to present any evidence of concerted action. 508 F. Supp. at 975-976.

With respect to jurisdiction, the District Court found that under the tests set forth in *McLain* and *Hospital Building Co.*, that plaintiffs had failed to show a "not insubstantial effect" on interstate commerce. The District Court concluded that "because plaintiffs' interstate activities are so insubstantial, defendants' business activities could not 'as a matter of practical economics,' substantially affect them." 508 F. Supp. at 977.

The District Court also held that the Oregon Insurance Commissioner had exclusive jurisdiction over plaintiffs' claims. 508 F. Supp. at 977.

The Ninth Circuit Decision.

The Ninth Circuit panel reversed and remanded for further proceedings. The panel held the McCarran-Ferguson Act exemption inapplicable:

> "Although the Supreme Court did not hold that effect on non-insurance markets was in itself sufficient to negate the applicability of the McCarran-Ferguson exemption, arrangements whose primary impact is on competition in mar-

> kets other than that for insurance do not fall within the exemption. Since this is the case here, the appellees cannot claim benefit of the McCarran-Ferguson exemption." 689 F.2d at 844.

The Ninth Circuit panel also reversed the District Court's finding that plaintiffs had failed to meet the interstate commerce jurisdictional requirement of the Sherman Act. The panel remanded:

> "for identification of a relevant aspect of interstate commerce and a determination whether defendants' relevant insurance activities, taking into account their overall effect on interstate commerce and not simply their effect on the particular plaintiffs before the court, have, as a matter of practical economics, a 'not insubstantial effect' on interstate commerce." 689 F.2d at 844.

The District Court's Klamath Lake Opinion.

On the same day, the District Court issued its opinion in *Klamath Lake*. The two cases had one defendant in common, K.M.S.B., a nonprofit provider of health insurance and health care services. The *Klamath Lake* plaintiff was an assignee of several pharmacies in the Klamath Falls area. Plaintiff attacked the prescription drug benefit of one of the K.M.S.B. policies. After initial discovery, the defendants moved for summary judgment, and the District Court granted the motion.

As in *Hahn*, the District Court analyzed *Royal Drug* and *Barry*. As in *Hahn*, the District Court distinguished *Royal Drug* because here, the challenged

pharmacy benefit was in the insurance policy itself, and that benefit spread the risk that the insured may need the covered service among all those who paid premiums for the coverage. 507 F. Supp. at 983.

Again, as in *Hahn*, the District Court found that the business of insurance was regulated by state law under the Oregon Insurance Code, O.R.S. 750.005-.340 [sic], 743.006, 743.009 and 746.160(3). 507 F. Supp. at 983.

Likewise, the District Court found that there was no boycott involved here, because K.M.S.B. did not preclude its insureds from patronizing plaintiff's assignors. 507 F. Supp. at 984.

The Ninth Circuit's Klamath Lake Decision.

Unlike the *Hahn* panel, the Ninth Circuit *Klamath Lake* panel affirmed the District Court's McCarran-Ferguson analysis. The *Klamath Lake* panel stated:

> "We do not believe that the [Supreme] Court intended to remove the business of health insurance from the McCarran-Ferguson exemption. Had it so intended its detailed analysis of the limits of the insurance exemption in Royal Drug would have been unnecessary." No. 81-3608, slip op. at 17.

The panel also agreed with the District Court's analysis of the state regulation requirement and the boycott exclusion. No. 81-3608, slip op. at 18-21.

REASONS FOR GRANTING THE WRIT

When two or more courts of appeals render diametrically opposed decisions regarding the legality and effect of similar arrangements, one of those decisions is likely to be incorrect. Such an unusually direct conflict between two circuits presents the paradigm for granting certiorari under this Court's Rule 17.1(a). Likewise, the difference in result between two of the same circuit's panels highlights the conflict between the decision here and this Court's decisions, presenting a separate reason for granting certiorari under this Court's Rule 17.1(c).

Certiorari is particularly appropriate because the conflicts dramatize two legal issues fundamental to the proper enforcement and application of the Sherman Act and the McCarran-Ferguson Act: first, whether antitrust plaintiffs must show a nexus between the alleged antitrust violation and interstate commerce; second, how the "business of insurance" exemption applies to health care insurers.

The inconsistent resolution of the interstate commerce question by the First and Tenth Circuits on the one hand and the *Hahn* Ninth Circuit panel on the other has important ramifications for the nation's competitive economy. The inconsistent resolution of the McCarran-Ferguson question by two different Ninth Circuit panels likewise has important ramifications for the health care industry. Faced with standards so amorphous that the same practices can be simultaneously condoned and condemned by differ-

ent courts, health care providers and insurers have no way of rationally planning their conduct. This uncertainty can seriously deter the competition the antitrust laws seek to encourage. As this Court emphasized in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978),

> "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment to even a good-faith error of judgment." (footnote omitted)

While *United States Gypsum* stressed the need for clear standards in criminal conspiracy cases, this Court's observations are equally pertinent in the civil antitrust context. See *Texas Industries* v. *Radcliff Materials*, 451 U.S. 630, 637 (1981).

I

The District Court Properly Applied the Jurisdictional Test by Weighing the Effect That the Allegedly Objectionable Restrictions Have on Interstate Commerce.

The Ninth Circuit interstate commerce test articulated in this case directly conflicts with the standards enunciated in *Crane* v. *Intermountain Health Care, Inc.*, 637 F.2d 715, 720-727 (10th Cir. 1981) (en banc) ("*Crane*") and *Cordova & Simonpietri Ins.* v. *Chase Manhattan Bank*, 649 F.2d 36, 44-46 (1st Cir.

1981) ("*Cordova*"). A recent Sixth Circuit opinion acknowledges this conflict among the circuits. *James R. Snyder Co.* v. *Associated Gen. Contr.*, 677 F.2d 1111, 1115 n. 3 (6th Cir. 1982). See *Pao* v. *Holy Redeemer Hosp.*, 547 F. Supp. 484, 488-489 (E.D. Pa. 1982) ("*Pao*"); *Cardio-Medical Assoc.* v. *Crozer-Chester Med. Ctr.*, 536 F. Supp. 1065, 1074-1078 (E.D. Pa. 1982) ("*Cardio-Medical*"); *Nara* v. *American Dental Association*, 526 F. Supp. 452, 455-457 (W.D. Mich. 1981) ("*Nara*"); *McDonald* v. *Saint Joseph's Hospital of Atlanta*, 524 F. Supp. 122, 129 (N.D. Ga. 1981); *Malini* v. *Singleton & Associates*, 516 F. Supp. 440, 442-444 (S.D. Tex. 1981).

The Ninth Circuit purports to follow this Court's opinion in *McLain*. In reality, the panel follows *Palmer* v. *Roosevelt Lake Log Owners Association*, 651 F.2d 1289, 1291 (9th Cir. 1981) ("*Palmer*"), and holds that the District Court erred by focusing "its inquiry exclusively on the nature and extent of plaintiffs' interstate contacts, concluding that, because plaintiffs' interstate activities are insubstantial, defendants' activities could not substantially affect them." *Hahn*, 689 F.2d at 844.

Starting with *Western Waste Service* v. *Universal Waste Control*, 616 F.2d 1094 (9th Cir.), cert. denied, 449 U.S. 869 (1980) ("*Western Waste*"), the Ninth Circuit has applied an overbroad construction of the *McLain* opinion.[1] E.g., *Turf Paradise, Inc.*

[1] Outside the Ninth Circuit, apparently only one court has adopted the *Western Waste* analysis. *McElhinney* v. *Medical Protective Co.*, 549 F. Supp. 121, 127 (E.D. Ky. 1982).

v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, — U.S. —, 102 S. Ct. 2308 (1982); *Community Builders, Inc.* v. *City of Phoenix*, 652 F.2d 823 (9th Cir. 1981); *Palmer*, 651 F.2d 1239.

A number of cases have squarely rejected the Ninth Circuit's overbroad reading. In *Crane*, the Tenth Circuit, sitting en banc, made a detailed review of the applicable Supreme Court cases and noted that the Ninth Circuit decision in *Western Waste* did not alter their conclusion.[2] Judges in the Eastern District of Pennsylvania have rejected the *Western Waste* analysis and followed the Tenth Circuit's *Crane* analysis, noting that the First Circuit in *Cordova*[3] has taken the same position. *Pao*, 547

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[2] *Crane*, 637 F. 2d at 723 n. 3. As stated in text:

"Crane asserts *McLain* holds that Sherman Act jurisdiction is satisfied if interstate commerce is substantially affected by defendants' general or overall business — the alleged unlawful activity need not itself cause such an effect. Language in a later decision arguably supports this contention, see *Western Waste Service Systems* v. *Universal Waste Control*, 616 F. 2d 1094, 1096-97 (9th Cir.), cert. denied, — U.S. —, 101 S. Ct. 205, 66 L. Ed. 2d 88 (1980), but in our view the argument misses *McLain's* mark. While some language in *McLain* is less than clear, an examination of that case in the context of earlier Supreme Court opinions shows that it does not signal a departure from the principles governing the 'effect on commerce' test." 637 F. 2d at 721.

"In sum, we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." 637 F. 2d at 724.

[3] The *Cordova* court recognized the pitfalls in reading *McLain* too broadly:

"While the [*McLain*] Court's language is somewhat ambiguous, its specific reference to 'respondents' brokerage

F. Supp. at 488-490;[4] *Cardio-Medical*, 536 F. Supp. at 1075-1076.[5] A recent Tenth Circuit panel has reaffirmed and applied the en banc decision in *Crane. Mishler* v. *St. Anthony's Hosp. Systems*, 694 F.2d 1225 (10th Cir. 1981). Cf. *Heille v. City of St. Paul, Minn.*, 512 F. Supp. 810, 813-814 (D. Minn. 1981), aff'd, 671 F.2d 1134, 1136-1137 (8th Cir. 1982) (distinguishing *Western Waste*).

(Footnote 3 continued)

activity' would seem to require plaintiffs in that price-fixing case to do more than simply point to some aspect of defendants' business which involves interstate commerce. Were so minimal a showing sufficient, the most local of conspiracies would fall inside, or outside, the Sherman Act, depending upon the fortuitous circumstance of whether a defendant firm happened to be owned by an interstate conglomerate. The Court does not sanction that result. Rather, its opinion simply emphasizes that a plaintiff need not prove that a defendant's unlawful activities *actually* affected interstate commerce; but it goes on to suggest that defendants' business still must be so connected with interstate commerce that it is logical, as a matter of practical economics, to believe that the unlawful activity will affect interstate commerce. Thus, the Court speaks of 'the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved.' [citations omitted] This interpretation of *McLain* has been followed by the Tenth Circuit, which wrote that 'for jurisdictional purposes a plaintiff must point to the relevant channels of interstate commerce logically affected by the defendants' unlawful conduct.' *Crane* v. *Intermountain Health Care*, 1980-81 Trade Cas. (C.C.H.) ¶ 63,743 (10th Cir. January 20, 1981). And, *McLain*, as so interpreted, has the practical virtue of allowing plaintiffs to proceed against those local price fixing agreements (and similar restraints of trade) that are most likely to affect interstate commerce without imposing, under jurisdictional guise, a 'proof of effects' test that, in a turbulent, ever-changing economy, may be difficult, or impossible, to meet." 649 F.2d at 45 (footnotes omitted) (emphasis by the court).

[4] In *Pao*, Judge Pollock states:

"Plaintiff here and the Ninth Circuit in the *Western Waste Services* case relied upon the [*McLain*] underscored

Professor Areeda has analyzed the *McLain*, *Crane*, *Western Waste* and *Cordova* opinions and has concluded that the language in *McLain* does not compel the result reached in *Western Waste*, but instead supports the results in *Crane* and *Cordova*. P. Areeda,

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(Footnote 4 and 5 continued)

language, interpreting this to mean that the Supreme Court had abandoned the long-standing requirement of a nexus between the alleged restraint and interstate commerce. But this interpretation of *McLain* builds a taller edifice than the underscored language will support: First, the Court did not state that it was abandoning the earlier cases and in fact the decision cites those earlier opinions with approval. See 444 U.S. at 241-43, 100 S. Ct. 508-09. Moreover, later in the opinion, the Court noted that the establishment of federal jurisdiction in a Sherman Act case requires 'that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on interstate commerce.' Id. at 246, 100 S. Ct. at 511 (citing *Hospital Bldg. Co* v. *Rex Hospital*). The opinion taken as a whole seems to leave the jurisdictional test essentially as it was: to establish subject matter jurisdiction, a plaintiff must show that the defendant's allegedly unlawful conduct has as a matter of practical economics a not insubstantial effect on interstate commerce. All that *McLain* emphasized is that a plaintiff need not make a 'particularized showing' that as a matter of *fact* the defendant's alleged restraint had a substantial impact upon interstate commerce. The *McLain* Court stressed that requiring an evidentiary showing of actual effects on interstate commerce would impose a too stringent standard. Instead, a test framed in terms of probable effects on interstate commerce based on the logic of practical economics would be sufficient. This is the view of *McLain* that has been adopted by the First and Tenth Circuits, see *Cordova & Simonpietri Ins. Agency* v. *Chase Manhattan Bank*, supra, 649 F. 2d at 45; *Crane* v. *Intermountain Health Care*, supra, 637 F. 2d at 724, by former Chief Judge Lord of this Court, *Cardio-Medical Associates* v. *Crozier-Chester Medical Center*, 536 F. Supp, 1065, 1075-76 (E.D. Pa. 1982), and by Professor Areeda in *Antitrust Law*, ¶ 232.1c at 94 (1982 Supp.)." *Pao*, 547 F. Supp. at 489 (emphasis by court).

[5] In *Cardio-Medical*, Chief Judge Lord is explicit:

"I reject this [*Western Waste*] interpretation and, in the absence of any binding Third Circuit precedent, choose to follow the Tenth Circuit's lead, explicated below, on this issue.

Antitrust Law ¶ 232.1c at 94-95 (Supp. 1982). At least one other comment also supports *Crane* and rejects *Western Waste.* Kissam, Webber, Bigus and Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Calif. L. Rev. 595, 632-633 (1982).

(Footnote 5 continued)

See *Crane* v. *Intermountain Health Care, Inc.*, 637 F. 2d. 715, 721-24 (10th Cir. 1980) *(en banc).*

"Within the context of the facts and entire opinion of *McLain,* the Court must have been referring to the *challenged activities* of defendants and not the brokers' overall business activities, as suggested by the student comment and the Ninth Circuit cases. The reference to 'particularized showing' was merely intended as an affirmation of the earlier holdings in *Hospital Building Company, Burke* [v. Ford, 389 U.S. 320 (1967)], and *Goldfarb* [v. Virginia State Bar, 421 U.S. 773 (1975)] that, for jurisdictional purposes, a plaintiff is under no obligation to make a particularized showing:

> 'In other words, an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce. The emphasis was intended to be that a "particularized" showing is not necessary, not that showing of a nexus between unlawful conduct and effect is unnecessary.'

Crane, 637 F. 2d at 723. I therefore decline to hold that the Supreme Court squarely reversed the holdings of a fourteen-year-old-line of precedent without even mentioning that such a dramatic shift in policy was occurring." *Cardio-Medical,* 536 F. Supp. at 1075-1076.

Chief Judge Lord continues:

"In *Nara v. American Dental Ass'n,* 525 F. Supp. 452 (W.D. Mich. 1981), the court explained why it would consider only plaintiff's involvement in interstate commerce:

> 'The issue raised by defendants' motions is whether defendants' conduct has substantially affected interstate commerce. If not, this court cannot exercise jurisdiction over the claims asserted by plaintiff under The Sherman Act. * * *. It should be noted that the interstate commerce in question here consists of the extent of plaintiff's practice of dentistry * * *. It does not concern the generalized

This Court should grant certiorari in this case to resolve the conflict among the circuits by rejecting the overbroad Ninth Circuit interpretation. The weight of logic and authority is against the Ninth Circuit interpretation, and it is unfair to burden Ninth Circuit antitrust defendants with the overbroad approach.

II

The District Court Properly Found an Exemption Under the McCarran-Ferguson Act for the "Business of Insurance" Involved Here.

The Ninth Circuit panel reverses the District Court's holding that the McCarran-Ferguson Act applies, stating, "the exemption is inapplicable upon the facts in issue." 689 F.2d at 841.

(Footnote 5 continued)

> interstate activities of any of the defendants. Plaintiff has spent much effort to demonstrate that the ADA, for example, is a nationwide association of which the state and local organizations are constituent members. What is relevant is not the interstate character of defendants' activities, but the effect that the objectionable restrictions have on interstate commerce * * *. Of necessity, therefore, one must look to the extent to which plaintiff is engaged in interstate commerce.'

Id. at 455 (citations omitted).

"I subscribe fully to the views expressed by the *Nara* court. As a matter of logic, the extent of defendants' activities in interstate commerce is irrelevant in a denial of hospital staff privileges case. For example, in this case, it is the effect on plaintiffs as a result of the denial to them by defendants of the right to practice cardiology procedures at CCMC that is the appropriate source of concern under the antitrust laws. The extent of defendants' involvement in interstate commerce is irrelevant for the purpose of this lawsuit because their denial of staff privileges to plaintiffs has no possible effect on their own activities in interstate commerce; the only potential effect relates to plaintiffs' practice of medicine." *Cardio-Medical,* 536 F. Supp. at 1077.

The panel purports to analyze this Court's decisions in *Royal Drug*, and *Union Labor Life Insur. Co. v. Pireno*, — U.S. —, 102 S. Ct. 3002 (1982) ("*Pireno*"). Unfortunately, the panel misconstrues these two recent opinions, and follows what it considers an analogous case, *Virginia Academy*.

The panel then states that the record does not support the District Court's conclusion that the exclusion of podiatrist services is an integral part of the risk of covering care to the foot. The panel states that petitioners have not introduced any evidence tending to establish any bona fide risk related reasons for an insurer to distinguish between the services of medical doctors and podiatrists, finding that "arrangements whose primary impact is on competition in markets other than that for insurance do not fall within the exemption." 689 F.2d at 844.

The panel has misread the record. As the panel itself notes:

> "Prepaid health care provider plans *are difficult to analyze* because they go beyond the normal insurance function of insuring against specific casualty losses, and may also provide routine health care services." 689 F.2d at 843 n. 2. (emphasis added).

The District Court was correct in holding that the Oregon Legislature has established a distinction between services provided by medical doctors and services provided by podiatrists. The panel fails to distinguish among the various petitioner-appellee-de-

fendants whose practices vary widely and paints them with the same broad brush. For example, the evidence is uncontradicted that O.P.S., P.A.C.C. and G.O.H.S.:

1. do not require insureds to obtain any podiatric services exclusively from medical doctors, or

2. do not refuse insureds reimbursement for treatment by a podiatrist unless they are referred by a medical doctor.

On the other hand, K.M.S.B. and P.M.H.I.:

1. do not require insureds to obtain any podiatric services exclusively from medical doctors,

2. but do require a referral as a condition of coverage.

It is also uncontradicted that G.O.H.S., for example, has no members and, thus, cannot discriminate against podiatrists by not permitting their membership.

The panel also misconstrues the *Virginia Academy* decision of the Fourth Circuit. Prior to the decision in *Virginia Academy*, the Virginia legislature had adopted legislation assuring equal provider status between psychologists and psychiatrists. The insurance policy, which admittedly did not afford equal status, violated state law. Additionally, in *Virginia Academy*, the insurers declined payment to psychologists unless they billed through a psychiatrist. No defendant in this case makes such a requirement. The

court in *Virginia Academy* found the "bill-through" practice unlawful, understandably concluding that the "bill-through" requirement had no bearing on distribution of risk under the policy, particularly where the legislature had declared equality between the two professions. This Court is not faced with a similar issue here, and *Virginia Academy* is not analogous.

In contrast, the Oregon Legislature requires supervision by a physician of a podiatrist in a variety of circumstances. This record discloses that even podiatrists themselves acknowledge that there is not consistent quality within their ranks and that upgrading of their profession is essential.

The *Hahn* panel's errors are highlighted by comparison with another Ninth Circuit decision affirming a parallel opinion by the same district judge. Senior Judge Solomon issued both his opinion in *Klaath Lake*, 507 F. Supp. 980 (D. Or. 1981) and his opinion in *Hahn*, 508 F. Supp. 970 (D. Or. 1981), the same day.

The *Klamath Lake* panel analyzes the recent Supreme Court opinions in *Royal Drug* and *Pireno*, much as does the *Hahn* panel. The *Klamath Lake* panel notes that the *Hahn* panel has "skirted" some aspects of the business of insurance issue. No. 81-3608, slip op. at 16. Unlike the *Hahn* panel, the *Klamath Lake* panel affirms the District Court opinion and holds that the McCarran-Ferguson Act exemption applies. No. 81-3608 at 16-21.

The District Court's analysis in both cases is sup-

ported by a number of other circuit decisions. See *Anglin* v. *Blue Shield of Virginia*, 693 F.2d 315 (4th Cir. 1982); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308 (D.C. Cir. 1982); *Quality Auto Body, Inc.* v. *Allstate Ins. Co.*, 660 F.2d 1195 (7th Cir. 1981); *Owens* v. *Aetna Life & Cas. Co.*, 654 F.2d 218 (3d Cir.), cert. denied, 454 U.S. 1092 (1981); *Thompson* v. *New York Life Ins. Co.*, 644 F.2d 439 (5th Cir. 1981). See also *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982) (discussing state regulation of dentistry). A number of district court opinions also support the analysis. See *Grant* v. *Erie Ins. Exchange*, 542 F. Supp. 457, 461-467 (M.D. Pa. 1982); *Nara*, 526 F. Supp. at 455-458; *Health Care Equalization* v. *Iowa Medical Soc.*, 501 F. Supp. 970, 993-995 (S.D. Iowa 1980).

In view of this conflict within the Ninth Circuit, and because of support shown for the District Court's analysis in other courts, this Court should grant certiorari to reject the *Hahn* panel's erroneous analysis of this Court's opinions in *Royal Drug* and *Pireno*.

CONCLUSION

For the foregoing reasons a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted

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